

NO. 21479 ✓

**United States
Court of Appeals**
for the Ninth Circuit

✓
21484

GEORGE GALLION,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

*On Appeal from the United States District Court
for the District of Oregon*

BRIEF OF APPELLEE

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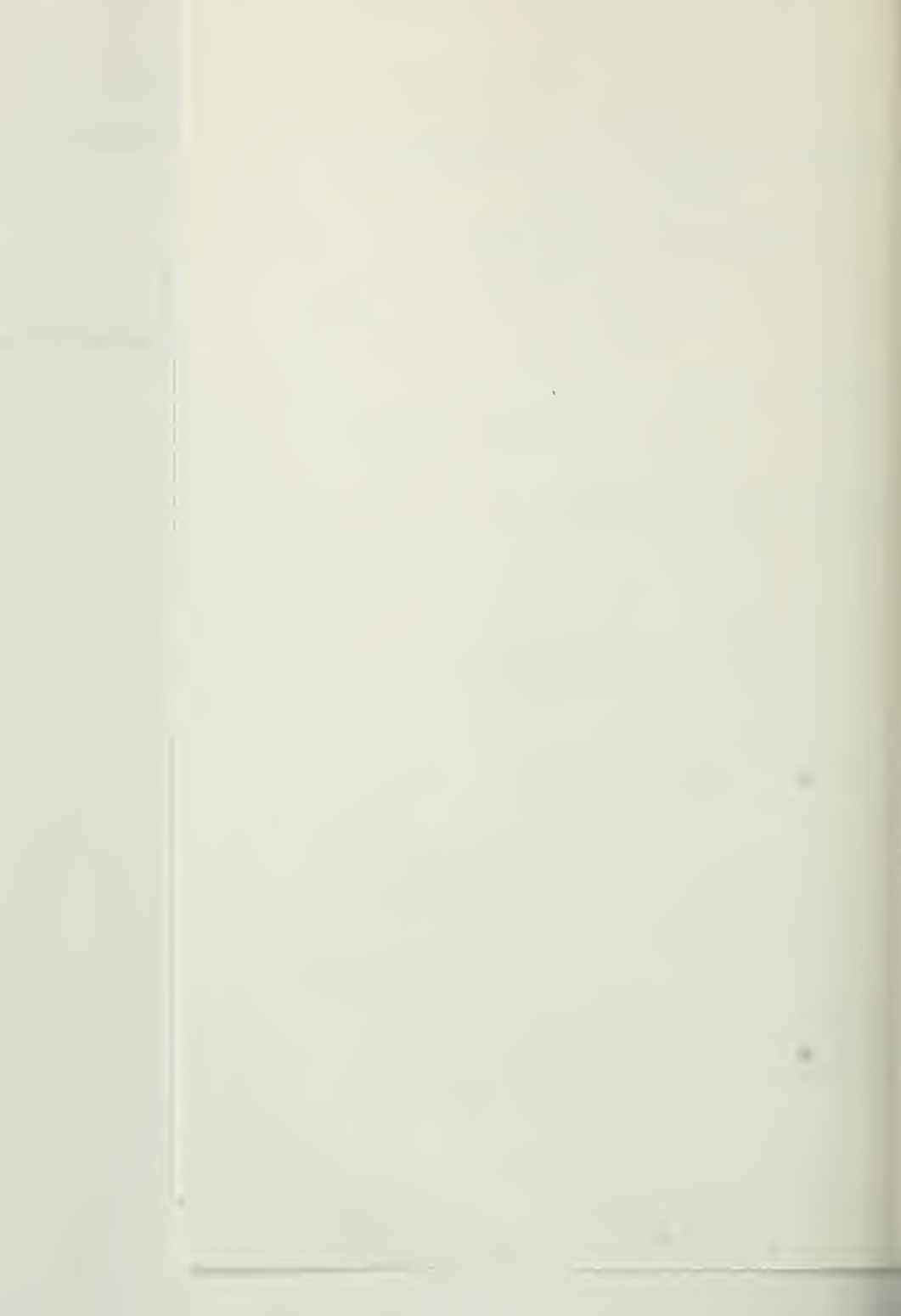
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JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Oregon was based on 18 U.S.C. 3231. This Court has jurisdiction by virtue of 28 U.S.C. 1291. The indictment charges an offense against the laws of the United States.

STATUTES INVOLVED

18 U.S.C. Sec. 2314. Transportation of stolen goods, securities, moneys, fraudulent state tax stamps, or articles used in counterfeiting.

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; . . ."

"Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

COUNTER-STATEMENT OF THE CASE

Appellant, George Gallion, was picked up by a man named Russell Frey while hitchhiking (TR. 8)¹ and they traveled together for about a week (TR. 2). Gallion stole two wallets belonging to Frey from their motel room in St. Paul, Minnesota (TR. 8, 13). The wallets contained Frey's identification (TR. 8), Frey's Arlington, Texas driver's license (TR. 10, 30), credit cards (TR. 9) and pictures of Frey and his family (TR. 63).

Gallion left St. Paul and went to Minneapolis, where he rented a car utilizing Frey's identification. The car was driven to Billings, Montana, and abandoned. Another car was rented and driven to Portland, Oregon, where it was also abandoned. On his trip east from Portland to Chicago, Gallion again rented a car, abandoned it in Omaha, Nebraska, and rented finally another car which was abandoned in Chicago (TR. 8).

Gallion registered at the Hilton Hotel under Frey's name while in Portland on November 14, 1965, (TR. 22) and signing as "Russell Frey" cashed the check in question in this case (Ex. 1), drawn on the First National Bank of Arlington, Texas, payable to the "Hilton" (TR. 21). The check went through the

¹As used hereafter TR. denotes the transcript of proceedings, R. the record on appeal, Ex. the government's exhibits at trial, and App. Br. appellant's brief on appeal.

normal check collection process and was presented for payment to the First National Bank of Arlington, Texas, where it was dishonored due to an improper signature (TR. 21).

On November 15, 1965, Gallion registered himself and a woman at the Lamplighter Motel in Astoria, Oregon, as Mr. and Mrs. Russell Frey (Ex. 4) and stayed at the Lamplighter for two days (TR. 24). The motel bill was paid by using Frey's American Express credit card. Gallion also cashed another check drawn on the First National Bank of Arlington (Ex. 3) payable to the Lamplighter Motel (TR. 25).

When interviewed by F.B.I. Special Agent Allan Lavanger at the Hilton Hotel in Chicago, on November 23, 1965, Gallion gave a detailed account of his activities (TR. 8, 9) which were corroborated by subsequent F.B.I., investigation (TR. 13). He did not claim that he believed he was Russell Frey while using Frey's identification during the interview. When arrested on December 3, 1965, Gallion told Lavanger that "everything he had said previously as far as he could recall was correct" (TR. 13). Gallion was indicted on June 13, 1966 (R. 1), and plead not guilty at arraignment on July 27, 1966 (R. 3). On August 10, 1966, Gallion waived his right to a trial by jury (R. 4), and trial commenced on August 25, 1966 (R. 5).

During the trial, the government's handwriting expert, Palmer Tunstall, testified that Gallion had signed the check (Ex. 1) in question (TR. 31), that there was some indication that Gallion had attempted to disguise his handwriting (TR. 31), that Gallion in signing Frey's name used a handwriting very similar to Frey's but different from the handwriting used in signing his own signature (TR. 33), that if Gallion had never seen Frey's signature it would have been unlikely that his handwriting in signing Frey's signature would have been as similar as it was (TR. 71), and that as the signature on the check appeared to have been written at a normal speed, this could indicate that Gallion had practiced Frey's signature (TR. 69, 70).

Gallion testified that he could not remember having committed any act as Russell Frey, although he did remember Frey (Tr. 51, 52).

Dr. Rogers Smith, the court-appointed psychiatrist, testified on behalf of defendant that Gallion was suffering from a "classical dissociative reaction" (TR. 54), that Gallion had had a history of fugue periods (TR. 54), that Gallion was probably in a fugue state or a period of fugue states from April to November of 1965 (TR. 72) [" . . . The fugue state period is this period of amnesia of sudden onset and sudden termination of the term" (TR. 55) * * * "An individual who has this,

demonstrates a sudden onset or beginning sudden termination of a period which may last some hours up to months. A period during which they may either lose identity or have a substitute identity. * * *” (TR. 54)], that there is generally total amnesia for the events of the fugue period although in some cases there can be a later recovery (TR. 61), that Gallion while in a fugue state would have thought that his appearance had changed quite a bit and would have been confused if he had looked at Frey’s picture in one of the wallets (TR. 63), that Gallion possibly had a better memory than he indicated on the witness stand, and that if Gallion had tried to conform his handwriting as closely as possible to that of Frey’s, Gallion “. . . probably wasn’t in a fugue state at the time because there would be no reason for him to have to practice his signature” (TR. 69).

On August 30, 1966, Gallion was found guilty (R. 10), and was sentenced to 7 years imprisonment on October 19, 1966 (R. 12). The opinion of Judge Solomon is attached as an Appendix to this brief.

ARGUMENT

I

The Evidence is Sufficient to Support a Finding that Appellant Knew He Was George Gallion and Not Russell Frey.

Appellant's defense was based upon the court-appointed psychiatrist's testimony that the appellant was in a "fugue state" and believed he was Russell Frey when he forged the check (Exhibit 1.) which was the subject of the Indictment. The trial Court found that the appellant

" . . . knowingly gave Dr. Roger Smith false information in order to get Dr. Smith to testify that he was in a fugue state on or about November 14, 1965," . . . and that the appellant . . . "was not in a fugue state, knew he was not Russell Frey, and that he . . . had the requisite intent to commit the offense." (R. 9).

The trial court's finding that the appellant was not in a fugue state is not inconsistent with Dr. Smith's diagnosis on the facts given to him. Since it was based on false information knowingly supplied by the appellant (R. 9), the diagnosis was not binding upon the court.

Expert opinion rises no higher than the reasons upon which it is based and it is not binding upon the trier of the facts. *Dusky v. U.S.*, 295 F.2d 743, 754. (C.A. 8, 1961).

“ . . . one of the most generally accepted rules in all jurisprudence, state, and federal, civil and criminal, is that the questions of the *credibility*, and *weight* of expert opinion testimony are for the trier of facts, and that such testimony is ordinarily not conclusive even where it is contradicted.”

Mims v. U.S., 375 F.2d 135, 140 (C.A. 5, 1967) and cases therein cited in footnote 2. See also *Holm v. U.S.*, 325 F.2d 44, 46 (C.A. 9, 1963), where this court upheld jury instructions to the effect that the jury could reject the expert witness's testimony in its entirety if the reasons given in support of the opinion were unsound.

The trial court's finding that appellant knowingly gave Dr. Smith false information was amply supported by the record. Appellant disguised his handwriting (TR. 31) and practiced Frey's signature (TR. 69, 70) which he would not have done if really in a fugue state (TR. 69).

Appellant gave a detailed account of his activities when interviewed by the FBI in Chicago (TR. 8, 9) but at trial could not remember having committed any act as Russell Frey (TR. 51, 52). A person who has just come out of a fugue state normally has total amnesia for the events of the fugue period with a possibility of later recovery (TR. 61). Appellant, however, did not discover his amnesia until he took the witness stand.

Appellant rented numerous cars during his hypothetical fugue period and abandoned them all (TR. 8). If appellant really believed he was Frey, he would not have had any reason for abandoning the cars and would have driven one car all the way, or at the very least, would have returned the cars to the appropriate rental agency.

II

The Evidence is Sufficient to Support a Finding that Appellant Knew the Check was Falsely Made or Forged.

Appellant's contention to the contrary is without merit. Since the appellant knew he was not Russell Frey when he signed Frey's signature, he necessarily must have known that the check was falsely made or forged.

Barry v. U.S., 287 F.2d 340 (C.A. D. C., 1961) cited by Appellant (App. Br. 5), is consistent with the Government's position. In that case the Court of Appeals held that where the defendant was charged with distributing a falsely made and forged security in interstate commerce it was error for the trial Court not to instruct the jury that the government must establish knowledge on the part of the defendant that the check was falsely made and forged.

Appellant's quotation from the *Modern Federal*

Practice Digest ("16A F Pr. Dig. 668") (App. Br. 6), that "Evidence which is as consistent with innocence as with guilt does not warrant conviction," is an abstract proposition of law with which the government has no quarrel. It simply has no application in this case.

III

There is Sufficient Evidence to Support a Finding that Appellant Acted with Unlawful or Fraudulent Intent.

When the appellant forged the check knowing he was not Russell Frey, he had the necessary unlawful or fraudulent intent. "The requisite intent exists where one obtains money or something of value in exchange for a check which he knows to be forged and which is drawn upon, and must be forwarded for collection to, a bank in another state." *Halfin v. U.S.*, 324 F.2d 52, 55 (C.A. 10, 1963); *U.S. v. Sheridan*, 329 U.S. 379 (1946).

Appellant in his brief states at pages 6 and 7:

" . . . it cannot seriously be contended that a statute which *expressly* requires that the *intent* to transport such items interstate be 'unlawful' or 'fraudulent' contemplates that such unlawful or fraudulent intent is to be assumed by the mere negotiation of the check."

Appellant cites no authority for this proposition which

is directly contrary to the well settled principle of law stated *supra*.

IV

Appellant was Guilty of Forging the Check in Violation of 18 U.S.C. §2314 as a Matter of Law When He Signed Russell Frey's Name Knowing He Was Not Russell Frey.

The government concedes that if appellant actually believed he was Russell Frey he would not have violated 18 U.S.C. §2314 at the time the check (Ex. 1) was signed. *Wright v. U.S.*, 172 F.2d 310 (C.A. 9, 1949); *Martyn v. U.S.*, 176 F.2d 609 (C.A. 8, 1949); *Melvin v. U.S.*, 316 F.2d 647 (C.A. 7, 1963).

In *Wright v. U.S.*, this court held that where the appellant in Arizona drew a check in his own name on an existing bank in Utah in which he had no money, appellant had not "falsely made" or "forged" a check in violation of 18 U.S.C. §2314. In this case the trial court has found that Gallion knowingly drew the check (Ex. 1) in another person's name.

But appellant argues that even if he knew he was George Gallion and not Russell Frey, there was still no violation of 18 U.S.C. §2314 under the holding in the *Wright* case because the check ". . . was exactly what it purported to be and was drawn by one acting under the name by which he was commonly known at the time" (App. Br. 9).

The language in the *Wright* case upon which the appellant relies is not part of the holding but is written by the court in explaining two cases from the Supreme Court of Arkansas:

"In each of the two cited cases, the Supreme Court of Arkansas held that the drawing of a bank check in the true name of the drawer, or in the name by which he was commonly known, with intent to defraud, did not constitute forgery." *Wright v. U.S.*, 172 F.2d 310, 311.

The government interprets this statement as including those situations in which a person's true name would not be the name under which he is customarily known.

No reasonable interpretation of this language could exempt one who is using an assumed name for a limited time primarily for the purpose of engaging in criminal activities.

CONCLUSION

Appellant had a fair trial. There is substantial evidence to support the Court's findings which are assigned as error and the Court's verdict of guilty upon the Indictment. Appellant's assignments of error are not well taken. The District Court's verdict of guilty should be affirmed.

Respectfully submitted,

SIDNEY I. LEZAK
United States Attorney
District of Oregon

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Date: day of August, 1967

SIDNEY I. LEZAK
United States Attorney

APPENDIX**DISTRICT COURT'S OPINION**

SOLOMON, Judge:

Defendant was indicted for having unlawfully, knowingly and wilfully caused to be transported in interstate commerce a falsely made, forged and counterfeited security. Specifically, the indictment charges that the defendant on or about November 14, 1965, cashed a check on a Texas bank, using the name Russell C. Frey, which check he knew to be forged at the time he presented it to the Portland Hilton Hotel.

Defendant pleaded not guilty. He asserts that he does not remember having cashed the check and does not remember any of the events that took place for several days either before or after the cashing of the check. Defendant also asserts that he did not have the requisite criminal intent because, at the time of the alleged offense, defendant asserts that he was in a fugue state. That is, defendant thought he was the man whose identity he assumed at the time he entered the fugue state.

Dr. Rogers Smith, the court-appointed psychiatrist, on the basis of statements made by defendant to him and reports which he examined, concluded that defendant periodically goes into a fugue state and that

in all probability he was in such a state at the time the check was cashed.

Prior to the cashing of the check in Portland, defendant had traveled with a Russell Frey for about a week. When they were in Minneapolis, Minnesota, the defendant stole two wallets of Russell Frey, rented a car in Frey's name, and proceeded west. Thereafter, defendant rented a number of cars which he abandoned at various points along the way. Defendant drove one of such cars to Portland, and registered at the Portland Hilton Hotel under the name of Russell Frey. He issued a countercheck in the sum of \$25.00, drawn on the First National Bank of Arlington, Texas, which bank returned it unpaid.

Within one or two days of the time that the defendant issued the check to the Portland Hilton, defendant was in Astoria, Oregon, in the company of a woman not his wife. They registered at the motel under the names of Mr. and Mrs. Russell Frey. Defendant used an American Express Credit card to pay for his room and issued another check to the motel on the First National Bank of Arlington, Texas, to obtain some cash.

Approximately a week later, defendant registered at the Conrad Hilton Hotel in Chicago, Illinois. When the management discovered that the defendant was not the same person whose identification cards he carried, one of the assistant managers called upon the defendant and asked for an explanation. Defendant asked

to talk to an FBI agent. When the agent arrived, defendant told him that he had suffered from mental lapses, and then gave the agent a detailed account of the theft of the wallets, the places where he had rented cars, and the cities in which he abandoned those cars. He also gave the agent much other information about which he now testifies he has no memory.

The defendant used the identification in the wallets of Russell Frey in order to rent cars, pay hotel bills, and obtain cash. He now asserts that he was in a fugue state and thought that he was Russell Frey during the period in which these activities took place. One of the pieces of identification in the wallet was a Texas driver's license which had a picture of the true Russell Frey. According to Dr. Smith, if defendant looked at the picture even in a fugue state he would know that he was not the true Russell Frey. The signature on the forged check is similar to the signature of the real Russell Frey and is different from the defendant's own handwriting. According to Dr. Smith, if defendant thought he was the real Russell Frey there would have been no occasion for defendant to have disguised his own handwriting and to have copied the signature of the real Russell Frey.

All of these circumstances, and particularly the detailed account of defendant's activities from the time he stole Frey's wallets in Minneapolis until he was visited by an FBI agent at the Conrad Hilton Hotel in

Chicago, convince me that he knowingly gave Dr. Rogers Smith false information in order to get Dr. Smith to testify that he was in a fugue state on or about November 14, 1965. I also find that the government has proved beyond a reasonable doubt and to a moral certainty that the defendant at the time he forged the signature of Russell Frey and cashed the check at the Portland Hilton Hotel was not in a fugue state, knew that he was not Russell Frey, and that he, the defendant, had the requisite intent to commit the offense.

Gus J. Solomon
District Judge